

[Summa Humma Enterprises v. Town of Tilton](#)

And here's another decision by the NH Supreme Court that's favorable to planning board authority.

The planning board held a hearing for a site plan submitted by the applicants for development of heavy equipment sales. Included in the site plan was a 90-foot flagpole, which would be used to fly a 960-square-foot American flag. The board had many questions about the flag and the pole, including noise, lighting, potential damage from ice, etc., most of which the applicant could not answer. The applicant did indicate that the large flag and tall pole were part of its effort to develop a "brand presence," and that the pole would be "fully engineered."

The board approved the site plan that evening, but limited the height of the flag pole to 50 feet (which is the zoning ordinance's building height limitation). The applicant appealed to superior court, which upheld the board's decision. The applicant appealed to the Supreme Court, which affirmed the decision. Note that this was not appealed to the ZBA; apparently, the planning board was using the zoning ordinance's building height limitation of 50 feet as a benchmark, and did not suggest that a flag pole was a building. Therefore, the planning board (apparently) was not interpreting the zoning ordinance, and its decision was appealable only directly to superior court.

The Supreme Court reviewed the planning board's authority in conducting site plan review, and noted that the purpose of such review was not merely to ensure that existing numeric standards were met, but that it also provided an opportunity for the board to ensure that aesthetic concerns were addressed.

"Where the role of site plan review is to ensure that uses permitted by the zoning ordinance are appropriately designed and developed, restricting the board's authority to the specific limitations imposed by ordinances and statutes would render the site plan review process a mechanical exercise. The planning board properly exercised its authority to impose conditions that are reasonably related to the purposes set forth in the site plan regulations; namely, the 'safe and attractive development' of the site."

Also, where the applicant failed to answer the questions of the board, the Court found that the board was justified in finding against the applicant (or at least in imposing a restrictive condition, as was the case here).

Justice Nadeau dissented, because he would have given the applicant more time to answer the questions of the board. The review and conditional approval were done in one night, which did not offer the applicant an opportunity to come back with substantiating information. But it is unclear from the facts as recited in the Court's opinion that the applicant actually expressed a willingness to provide additional information, or that the applicant was resistant and demanded a decision, or that the planning board offered further opportunity. I'm sure there's more to this story than is depicted in the Court's brief opinion.

A couple observations: the Court favorably cites the broad, but not unlimited, authority of the planning board in conducting site plan review; there is heavy reliance upon the underlying statutory purposes of site plan review, which would be helpful for board members to revisit from time to time. See RSA 674:44 (<http://www.gencourt.state.nh.us/rsa/html/LXIV/674/674-44.htm>). Even though Justice Nadeau was the sole dissenter, there's a lot to be gained from what he said--boards should work with applicants and provide them a reasonable opportunity to answer questions. The development application process should not disintegrate to a test of wits, summed up with "gotcha" points. I'm not saying that was the case here--there's too little information to tell one way or another.

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